RECORD AND BRIEFS

No. 141, Original

In The Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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TABLE OF CONTENTS

Page

1. MOTION FOR LEAVE TO FILE COMPLAINT. 1

2. COMPLAINT 1

APPENDIX – Rio Grande Compact ..... App. 1

3. BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT 1

APPENDIX – Map of Rio Grande Basin A-1

APPENDIX – Map of Rio Grande Project ... A-2

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STATE OF NEW MEXICO and STATE OF COLORADO,

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MOTION FOR LEAVE TO FILE COMPLAINT

The State of Texas hereby respectfully moves the Court for leave to file the Complaint submitted herewith. [1]

[1] The Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File Complaint have been authorized by the Rio Grande Compact Commissioner for the State of Texas, the Texas Commission on Environmental Quality, and the Attorney General of Texas.

In support of its Motion, the State of Texas asserts that its claims as set forth in the Complaint arise from an interstate water compact, its claims are serious and dignified, and there is no alternative forum in which adequate and complete relief may be obtained. For the reasons more fully set forth in the accompanying Complaint and Brief in Support of Motion for Leave to File Complaint, the State of Texas' Motion for Leave to File Complaint should be granted.

Respectfully submitted,

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STATE OF NEW MEXICO and STATE OF COLORADO,

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COMPLAINT

The State of Texas brings this action against the Defendants the State of New Mexico and the State of Colorado, and for its cause of action asserts as follows:

1. The Court has original and exclusive jurisdiction of this suit under Article III, Section 2, Clause 2 of the Constitution of the United States, and Title 28, Section 1251(a) of the United States Code.

2. The Rio Grande is an interstate and international river that originates in Colorado, flows

in a southerly direction into and through New Mexico and into Texas, and then to the Gulf of Mexico. The Rio Grande, after crossing the New Mexico–Texas state line, forms the international boundary between the United States of America (the "United States") and the United States of Mexico ("Mexico").

3. As a matter of interstate comity, and in order to resolve the existing and future controversies among them, and to equitably divide and apportion the water of the Rio Grande among them, the States of Colorado, New Mexico, and Texas signed the Rio Grande Compact on March 18, 1938. The Rio Grande Compact was ratified thereafter by the respective state Legislatures, and was consented to and approved by the United States pursuant to an Act of Congress. Act of May 31, 1939, ch. 155, 53 Stat. 785. The Rio Grande Compact is reprinted in the Appendix to this Complaint.

4. As detailed below, the Rio Grande Compact, among other purposes, was entered into to protect the operation of the Rio Grande Reclamation Project. The Rio Grande Compact requires that New Mexico deliver specified amounts of Rio Grande water into Elephant Butte Reservoir, a storage feature of the Rio Grande Reclamation Project. Once delivered to Elephant Butte Reservoir, that water is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual

arrangements. In order for water to be delivered to Rio Grande Project beneficiaries in southern New Mexico and in Texas, it must be released from Rio Grande Project facilities, and allowed to flow unimpeded through Rio Grande Project lands in southern New Mexico, and then across the state line into Texas. New Mexico has, contrary to the purpose and intent of the Rio Grande Compact, allowed and authorized Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico. New Mexico's actions, in allowing and authorizing the interception of Rio Grande Project water intended for use in Texas, violates the purpose and intent of the Rio Grande Compact, causing grave and irreparable injury to Texas.

5. The State of Colorado is named as a Defendant to this Complaint on the basis that it is a signatory to the Rio Grande Compact.

6. In 1904, an Irrigation Congress was held in El Paso, Texas, for the purpose of addressing and resolving a dispute between interests in New Mexico and interests in Texas over the waters of the Rio Grande ("1904 Irrigation Congress"). The 1904 Irrigation Congress resulted in a recommendation for the construction by the United States of a federal dam and reservoir near Engle, New Mexico (which became Elephant Butte Dam and Reservoir), to be operated as a federal reclamation project, pursuant to the Reclamation Act of 1902, by the United States Bureau of Reclamation ("Bureau of Reclamation"). The 1904 Irrigation Congress also recommended

delivery of water from the proposed project as between the lands in southern New Mexico and in Texas based on the ratio of project lands within each State. The recommendations of the 1904 Irrigation Congress were adopted by the Secretary of the Interior, and the Rio Grande Reclamation Project ("Rio Grande Project" or "Project") was authorized pursuant to the Rio Grande Reclamation Project Act, Act of February 25, 1905, ch. 798, 33 Stat. 814 ("Rio Grande Project Act").

7. In 1906 and again in 1908, the United States through the Bureau of Reclamation filed notices with the Territorial Engineer of the Territory of New Mexico of reservations of Rio Grande water for the Rio Grande Project, which gave notice that the United States had set aside all unappropriated waters of the Rio Grande for the federal purposes of the Project. The Bureau of Reclamation commenced operation of the Rio Grande Project in 1916.

8. As noted, Rio Grande Project water deliveries are made based upon the ratio between the irrigable acreage of the Rio Grande Project situated in New Mexico, and the irrigable acreage of the Rio Grande Project situated in Texas. Historically, this ratio has been 57% in New Mexico and 43% in Texas. The Elephant Butte Irrigation District ("EBID"), a political subdivision of the State of New Mexico, is the Rio Grande Project beneficiary of water from the Rio Grande Project for delivery and use in southern New Mexico. The El Paso County Water Improvement District No. 1 ("EPCWID"), a

political subdivision of the State of Texas, is the Rio Grande Project beneficiary of the water from the Rio Grande Project for delivery and use in Texas. On average, the City of El Paso, Texas receives approximately 50% of its water supply from the Rio Grande Project pursuant to contracts with EPCWID for Rio Grande Project water supply.

9. In 1906, the United States and Mexico entered into a Convention between the United States and Mexico for the Equitable Distribution of the Waters of the Rio Grande. Convention with Mexico for Upper Rio Grande, 34 Stat. 2953 ("1906 Treaty"). This Treaty provided for the delivery at or near El Paso, Texas, and Juarez, Mexico, up to a total maximum of 60,000 acre-feet of water annually from the Rio Grande Project. 1906 Treaty at Article I.

10. The Rio Grande Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas; nor did it articulate a specific state-line delivery allocation. Instead, it relied upon the Rio Grande Project and its allocation and delivery of water in relation to the proportion of Rio Grande Project irrigable lands in southern New Mexico and in Texas, to provide the basis of the allocation of Rio Grande waters between Rio Grande Project beneficiaries in southern New Mexico and the State of Texas. A fundamental purpose of the Rio Grande Compact is to protect the Rio Grande Project and its operations under the conditions that existed in 1938 at the time the Rio Grande Compact

was executed. The relationship between the Rio Grande Project authorization and the Rio Grande Compact presents unique issues that only this Court can resolve.

11. The State of Texas entered into the Rio Grande Compact under the following fundamental premises: (a) the operation of the Rio Grande Project by the United States, and the Rio Grande Project's allocations to Texas, were recognized and protected by the Rio Grande Compact; (b) New Mexico was required to make deliveries into Elephant Butte Reservoir to ensure that the United States could continue to operate the Rio Grande Project, and thereby provide for deliveries of water from the Rio Grande Project as had been previously authorized; and (c) New Mexico would not allow Rio Grande Project water allocated by the United States to Texas to be intercepted above the Texas state line for use in New Mexico. Unless the United States' operation of the Rio Grande Project is protected, as intended by the Rio Grande Compact and as authorized by the Rio Grande Project Act, Rio Grande Project deliveries of water to southern New Mexico, Texas and Mexico cannot be assured, and the rights of Texas under the Rio Grande Compact cannot be protected.

12. Various provisions of the Rio Grande Compact reflect one of the Rio Grande Compact's fundamental purposes of protecting the Rio Grande Project. Article III of the Rio Grande Compact requires that Colorado deliver water in the Rio

Grande at the Colorado–New Mexico state line in established quantities, based upon flows of water that are measured at various index stations.

13. Article IV obligates New Mexico to deliver water in the Rio Grande at San Marcial, New Mexico, which is just upstream of Elephant Butte Reservoir. In 1948, a Resolution adopted by the Rio Grande Compact Commission, in accordance with its powers afforded under Article XII of the Compact, changed the location of the gage for the measurement of New Mexico's deliveries from San Marcial to Elephant Butte Reservoir. These deliveries to Elephant Butte Reservoir, and thus to the Rio Grande Project, are based upon a tabulation of relationships that correspond to the quantity of water at specified indices in New Mexico. These index flows are to be further adjusted to establish New Mexico's delivery obligation based upon the water that would have been available for the Rio Grande Project absent upstream development that took place after 1929 and 1937. Water is delivered to Elephant Butte Reservoir because it was (and still is) the primary water storage location for the Rio Grande Project when the Rio Grande Compact was adopted.

14. Article I(l) of the Rio Grande Compact defines "usable water" as "all water, exclusive of credit water, which is in [Rio Grande] project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico." Article I also defines "credits" and "debits" as the

amounts of water delivered or not delivered by Colorado or New Mexico above or below their respective delivery obligations. Article VI of the Compact allows for and delineates how "credits" and "debits" are to be accounted. These terms reflect the interconnected nature of the Rio Grande Project and the Rio Grande Compact. These terms have no meaning absent the existence and operation of the Rio Grande Project by the United States.

15. Article VII of the Rio Grande Compact precludes Colorado and New Mexico from increasing the amount of water in storage in reservoirs constructed after 1929, whenever there is less than 400,000 acre-feet of usable water stored in Rio Grande Project facilities, subject to exceptions associated with releases from Elephant Butte Reservoir that are, on average, greater than 790,000 acre-feet per annum, or where there are relinquishments of accrued credits available. Under specified circumstances, Article VIII of the Rio Grande Compact allows the Commissioner of Texas to demand that Colorado and/or New Mexico release water from storage in reservoirs constructed after 1929 to the amount of accrued debits sufficient to bring the quantity of usable water in Rio Grande Project storage to 600,000 acre-feet.

16. Article XI of the Rio Grande Compact provides that nothing within the Compact shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of water, at

the point of delivery, be changed hereafter by one signatory state to the injury of another.

17. Article XII of the Rio Grande Compact created the Rio Grande Compact Commission, and requires that the actions of the Commission must be unanimous. Article XIII requires that the terms of the Rio Grande Compact cannot be amended without the unanimous approval of all four parties to the Compact.

18. New Mexico's actions have reduced Texas' water supplies and the apportionment of water it is entitled to from the Rio Grande Project and under the Rio Grande Compact. The Rio Grande Compact is predicated on the understanding that delivery of water at the New Mexico–Texas state line would not be subject to additional depletions beyond those that were occurring at the time the Rio Grande Compact was executed. New Mexico, through the actions of its officers, agents and political subdivisions, has increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground, downstream of Elephant Butte Dam, by individuals or entities within New Mexico for use within New Mexico. The excess diversion of Rio Grande surface water and the hydrologically connected underground water downstream of Elephant Butte Reservoir adversely affects the delivery of water that is intended for use within the Rio Grande Project in Texas. Despite the State of Texas' request that New Mexico take action to cease these diversions and

extractions, these unlawful surface water diversions and extractions of water from beneath the ground have increased over time until, in 2011, they amounted to tens of thousands of acre-feet of water annually. These unlawful surface water diversions and extractions of water from beneath the ground intercept water that in 1938 would have been available for use in Texas, and convert that water for use in New Mexico. The unlawful diversion of surface water and extraction of underground water also require more water to be released from Elephant Butte Reservoir depleting Rio Grande Project storage. These extractions also create deficits in tributary underground water which must be replaced before the Rio Grande can efficiently deliver Rio Grande Project water. This requires additional releases of water from Elephant Butte Reservoir, which has a detrimental effect on the amount of water stored in Elephant Butte Reservoir for future use. Depleted reserves at Elephant Butte Reservoir have adverse impacts on future water supplies that should otherwise be available to the Rio Grande Project for delivery in southern New Mexico, Texas and Mexico. These extractions have a direct adverse impact on the amount of water delivered to Texas pursuant to the Rio Grande Project authorization and the Rio Grande Compact. These extractions were not occurring in 1938 when Colorado, New Mexico, and Texas entered into the Rio Grande Compact to equitably apportion these waters. Thus, New Mexico has changed the conditions that existed in 1938 when the Compact was executed to the detriment of the State of Texas.

19. New Mexico's actions, including the actions of its State Engineer and its Rio Grande Compact Commissioner, have validated and encouraged, rather than prevented, the development of post-Compact depletions of the Rio Grande below Elephant Butte Reservoir. This has resulted in ongoing, material depletions of flows of the Rio Grande at the New Mexico–Texas state line, causing substantial and irreparable injury to Texas. By its failure to control and prevent the proliferation of post-Rio Grande Compact pumping of water hydrologically connected to the Rio Grande, and by its acquiescence in surface water diversions and failure to prevent non-permitted diversion of surface water, New Mexico has ignored and undermined Texas' rights to water from the Rio Grande Project, and has breached and continues to breach its obligations and responsibilities under the Rio Grande Compact.

20. New Mexico has attempted and continues to attempt to control the operation of the Rio Grande Project in contravention of the Rio Grande Project Act and the Rio Grande Compact, through novel interpretations of the Rio Grande Compact that New Mexico has offered in litigation it initiated in the United States District Court in New Mexico (*State of New Mexico v. U.S. Bureau of Reclamation, et al.*, No. Civ. 11-691 JB/WDS (D. N.M. filed Aug. 8, 2011)), and in Rio Grande Compact Commission meetings and deliberations. In the United States District Court action, New

Mexico has asked the Court to interpret the Rio Grande Compact incorrectly in contravention of New Mexico's rights and obligations under the Compact, and thereby, among other things, enable New Mexico to vitiate a 2008 agreement among the United States, EBID and EPCWID relating to Project operations and the allocation of Project water to EBID and EPCWID. Operating Agreement for the Rio Grande Project (March 10, 2008); hereafter the "2008 Operating Agreement." The States of New Mexico and Texas are not parties to the 2008 Operating Agreement, nor is Texas a party to this federal court litigation in which New Mexico challenges the 2008 Operating Agreement.

21. New Mexico has also taken positions in actions in New Mexico state court advancing novel views of the application of Section 8 of the 1902 Reclamation Act, 43 U.S.C. § 383, which are adverse to Texas' rights under the Rio Grande Compact and Rio Grande Project Act. These positions, if adopted, would result in a decrease of the lawful amounts of Rio Grande Project water available for delivery by the United States from the Rio Grande Project, including water apportioned to Texas, in contravention of the Rio Grande Project Act and the Rio Grande Compact. Specifically, New Mexico has asserted that the Rio Grande Project is not entitled to the full benefit of the waters of the Rio Grande below Elephant Butte Reservoir, and that New Mexico pumpers of water found under the ground have a prior right to Rio Grande Project water, regardless of the fact that this water is

hydrologically connected to the Rio Grande and originated from the Rio Grande and the Rio Grande Project. In essence, New Mexico asserts that so long as it has made Rio Grande Compact deliveries into Elephant Butte Reservoir, New Mexico may intercept and take this same water for use in New Mexico once it is released from Elephant Butte Reservoir. Thus, water allocated to Texas from the Rio Grande Project and the Rio Grande Compact would never leave New Mexico. These actions constitute a breach of New Mexico's contractual obligations under the Rio Grande Compact, including a breach of its obligation of good faith and fair dealing implicit in the Rio Grande Compact.

22. Consistent with the provisions of the Rio Grande Project Act and the Rio Grande Compact, the State of Texas has adjudicated the Rio Grande above Fort Quitman, Texas, entering a final decree in 2006 binding on the United States and EPCWID. In furtherance, Texas issued a Certificate of Adjudication in 2007 allowing for the diversion of water sufficient to meet Rio Grande Project and Rio Grande Compact diversion and use rights in Texas. The Certificate of Adjudication assumes compliance by the State of New Mexico with the provisions of the Rio Grande Project Act and the Rio Grande Compact. Absent New Mexico's compliance with the provisions of the Rio Grande Project Act and the Rio Grande Compact, the judicial decree entered into in Texas can have no practical effect, and cannot serve as a source of legal stability to those in Texas who obtain water from the Rio Grande Project. The Certificate of

Adjudication and the Final Decree of the 327th Judicial District Court in El Paso County, Texas, have not been given full faith and credit by the State of New Mexico, in violation of Article IV, Section 1 of the United States Constitution.

23. The aforementioned actions of New Mexico have resulted in the Rio Grande Compact Commission's inability to unanimously agree on appropriate accounting as is required under Articles XII and XIII of the Rio Grande Compact.

24. The acts and conduct of New Mexico, its officers, citizens and subdivisions in failing, neglecting and refusing to deliver water to Texas in available quantities required by the Rio Grande Project Act and the Rio Grande Compact, have caused grave and irreparable injury to Texas and its citizens who are entitled to receive and use the water apportioned to them pursuant to the Rio Grande Project Act and the Rio Grande Compact.

25. Grave and irreparable injury will be suffered in the future by Texas and its citizens unless relief is afforded by this Court to prevent New Mexico, its officers, citizens and political subdivisions from using and withholding water that Texas is entitled to, and which New Mexico is obligated to deliver, pursuant to the provisions of the Rio Grande Project Act and by the Rio Grande Compact.

26. New Mexico refuses to comply with its obligations under the Rio Grande Compact with respect to the delivery of Texas' apportionment of water under the Rio Grande Compact to the New Mexico–Texas state line, despite requests by Texas that New Mexico do so.

27. Texas has sustained damages arising from New Mexico's breach of the Rio Grande Compact, such damages consisting of the value of Texas' apportioned share of the waters of the Rio Grande lost to Texas as a result of New Mexico's depletions of the Rio Grande through its violation of the Rio Grande Compact and Rio Grande Project Act, in an amount to be proven at trial.

28. Texas has no effective remedy to enforce its rights under the Rio Grande Project Act and the Rio Grande Compact against New Mexico, except by invoking the Court's original jurisdiction in this proceeding.

WHEREFORE, the State of Texas respectfully prays that the Court:

1. Declare the rights of the State of Texas to the waters of the Rio Grande pursuant to and consistent with the Rio Grande Compact and the Rio Grande Project Act;

2. Issue its Decree commanding the State of New Mexico, its officers, citizens and political subdivisions, to: (a) deliver the waters of the Rio

Grande in accordance with the provisions of the Rio Grande Compact and the Rio Grande Project Act; and (b) cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project;

3. Award to the State of Texas all damages and other relief, including pre- and post-judgment interest, for the injury suffered by the State of Texas as a result of the State of New Mexico's past and continuing violations of the Rio Grande Compact and the Rio Grande Project Act; and

4. Grant all such other costs and relief, in law or in equity, that the Court deems just and proper.

Respectfully submitted,

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January 2013

RIO GRANDE COMPACT

The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes, and to that end, through their respective Governors, have named as their respective Commissioners:

For the State of Colorado	M.C. Hinderlider
For the State of New Mexico	Thomas M. McClure
For the State of Texas	Frank B. Clayton

who, after negotiations participated in by S.O. Harper, appointed by the President as the\representative of the United States of America, have agreed upon the following articles, to-wit:

ARTICLE I

(a) The State of Colorado, the State of New Mexico, the State of Texas, and the United States of America, are hereinafter designated *Colorado, New Mexico, Texas, and the United States*, respectively.

(b) *The Commission* means the agency created by this Compact for the administration thereof.

(c) The term Rio Grande Basin means all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman, including the Closed Basin in Colorado.

(d) The *Closed Basin* means that part of the Rio Grande Basin in Colorado where the streams drain into the San Luis Lakes and adjacent territory, and do not normally contribute to the flow of the Rio Grande.

(e) The term *tributary* means any stream which naturally contributes to the flow of the Rio Grande.

(f) *Transmountain Diversion* is water imported into the drainage basin of the Rio Grande from any stream system outside of the Rio Grande Basin, exclusive of the Closed Basin.

(g) *Annual Debits* are the amounts by which actual deliveries in any calendar year fall below scheduled deliveries.

(h) *Annual Credits* are the amounts by which actual deliveries in any calendar year exceed scheduled deliveries.

(i) *Accrued Debits* are the amounts by which the sum of all annual debits exceeds sum of all annual credits over any common period of time.

(j) *Accrued Credits* are the amounts by which the sum of all annual credits exceeds the sum of all annual debits over any common period of time.

(k) *Project Storage* is the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project, but not more than a total of 2,638,860 acre feet.

(l) *Usable Water* is all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.

(m) *Credit Water* is that amount of water in project storage which is equal to the accrued credit of Colorado, or New Mexico, or both.

(n) *Unfilled Capacity* is the difference between the total physical capacity of project storage and the amount of usable water then in storage.

(o) *Actual Release* is the amount of usable water released in any calendar year from the lowest reservoir comprising project storage.

(p) *Actual Spill* is all water which is actually spilled from Elephant Butte Reservoir, or is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir; provided, that actual spill of usable water cannot occur until all credit water shall have been spilled.

(q) *Hypothetical Spill* is the time in any year at which usable water would have spilled from project

storage if 790,000 acre feet had been released therefrom at rates proportional to the actual release in every year from the starting date to the end of the year in which hypothetical spill occurs; in computing hypothetical spill the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following the effective date of this Compact, and thereafter the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following each actual spill.

ARTICLE II

The Commission shall cause to be maintained and operated a stream gaging station equipped with an automatic water stage recorder at each of the following points, to-wit:

(a) On the Rio Grande near Del Norte above the principal points of diversion to the San Luis Valley;

(b) On the Conejos River near Mogote;

(c) On the Los Pinos River near Ortiz;

(d) On the San Antonio River at Ortiz;

(e) On the Conejos River at its mouths near Los Sauces;

(f) On the Rio Grande near Lobatos;

(g) On the Rio Chama below El Vado Reservoir;

(h) On the Rio Grande at Otowi Bridge near San Ildefonso;

(i) On the Rio Grande near San Acacia;

(j) On the Rio Grande at San Marcial;

(k) On the Rio Grande below Elephant Butte Reservoir;

(l) On the Rio Grande below Caballo Reservoir.

Similar gaging stations shall be maintained and operated below any other reservoir constructed after 1929, and at such other points as may be necessary for the securing of records required for the carrying out of the Compact; and automatic water stage recorders shall be maintained and operated on each of the reservoirs mentioned, and on all others constructed after 1929.

Such gaging stations shall be equipped, maintained and operated by the Commission directly or in cooperation with an appropriate Federal or State agency, and the equipment, method and frequency of measurement at such stations shall be such as to produce reliable records at all times. (Note: See Resolution of Commission printed elsewhere in this report.)

ARTICLE III

The obligation of Colorado to deliver water in the Rio Grande at the Colorado-New Mexico State Line, measured at or near Lobatos, in each calendar year,

shall be ten thousand acre feet less than the sum of those quantities set forth in the two following tabulations of relationship, which correspond to the quantities at the upper index stations:

DISCHARGE OF CONEJOS RIVER
Quantities in thousands of acre feet

Conejos Index Supply (1)	Conejos River at Mouths (2)
100	0
150	20
200	45
250	75
300	109
350	147
400	188
450	232
500	278
550	326
600	376
650	426
700	476

Intermediate quantities shall be computed by proportional parts.

(1) Conejos Index Supply is the natural flow of Conejos River at the U.S.G.S. gaging station near Mogote during the calendar year, plus the natural flow of Los Pinos River at the U.S.G.S. gaging station near Ortiz and the natural flow of San Antonio River at the U.S.G.S. gaging station at Ortiz, both during the months of April to October, inclusive.

(2) Conejos River at Mouths is the combined discharge of branches of this river at the U.S.G.S. gaging stations near Los Sauces during the calendar year.

DISCHARGE OF RIO GRANDE EXCLUSIVE OF CONEJOS RIVER

Quantities in thousands of acre feet

Rio Grande at Del Norte (3)	Rio Grande at Lobatos less Conejos at Mouths (4)
200	60
250	65
300	75
350	86
400	98
450	112
500	127
550	144
600	162
650	182
700	204
750	229
800	257
850	292
900	335
950	380
1,000	430
1,100	540
1,200	640
1,300	740
1,400	840

Intermediate quantities shall be computed by proportional parts.

(3) Rio Grande at Del Notre is the recorded flow of the Rio Grande at the U.S.G.S. gaging station near Del Norte during the calendar year (measured above all principal points of diversion to San Luis Valley) corrected for the operation of reservoirs constructed after 1937.

(4) Rio Grande at Lobatos less Conejos at Mouths is the total flow of the Rio Grande at the U.S.G.S. gaging station near Lobatos, less the discharge of Conejos River at its Mouths, during the calendar year.

The application of these schedules shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gaging stations; (b) any new or increased depletion of the runoff above inflow index gaging stations; and (c) any transmountain diversions into the drainage basin of the Rio Grande above Lobatos.

In event any works are constructed after 1937 for the purpose of delivering water into the Rio Grande from the Closed Basin, Colorado shall not be credited with the amount of such water delivered, unless the proportion of sodium ions shall be less than forty-five percent of the total positive ions in that water when the total dissolved solids in such water of [sic] exceeds three hundred fifty parts per million.

ARTICLE IV

The obligation of New Mexico to deliver water in the Rio Grande at San Marcial, during each calendar year, exclusive of the months of July, August, and September, shall be that quantity set forth in the following tabulation of relationship, which corresponds to the quantity at the upper index station:

DISCHARGE OF RIO GRANDE AT OTOWI BRIDGE AND AT SAN MARCIAL EXCLUSIVE OF JULY, AUGUST AND SEPTEMBER

Quantities in thousands of acre feet

Otowi Index Supply (5)	San Marcial Index Supply (6)
100	0
200	65
300	141
400	219
500	300
600	383
700	469
800	557
900	648
1,000	742
1,100	839
1,200	939
1,300	1,042
1,400	1,148
1,500	1,257
1,600	1,370
1,700	1,489
1,800	1,608
1,900	1,730

2,000	1,856
2,100	1,985
2,200	2,117
2,300	2,253

Intermediate quantities shall be computed by proportional parts.

(5) The Otowi Index Supply is the recorded flow of the Rio Grande at the U.S.G.S. gaging station at Otowi Bridge near San Ildefonso (formerly station near Buckman) during the calendar year, exclusive of the flow during the months of July, August and September, corrected for the operation of reservoirs constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and Otowi Bridge.

(6) San Marcial Index Supply is the recorded flow of the Rio Grande at the gaging station at San Marcial during the calendar year exclusive of the flow during the months of July, August and September.

The application of this schedule shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gaging stations; (b) depletion after 1929 in New Mexico at any time of the year of the natural runoff at Otowi Bridge; (c) depletion of the runoff during July, August and September of tributaries between Otowi Bridge and San Marcial, by works constructed after 1937; and (d) any transmountain diversions into the Rio Grande between Lobatos and San Marcial.

Concurrent records shall be kept of the flow of the Rio Grande at San Marcial, near San Acacia, and of the release from Elephant Butte Reservoir to the end that the records at these three stations may be correlated. (Note: See Resolution of Commission printed elsewhere in this report.)

ARTICLE V

If at any time it should be the unanimous finding and determination of the Commission that because of changed physical conditions, or for any other reason, reliable records are not obtainable, or cannot be obtained, at any of the stream gaging stations herein referred to, such stations may, with the unanimous approval of the Commission, be abandoned, and with such approval another station, or other stations, shall be established and new measurements shall be substituted which, in the unanimous opinion of the Commission, will result in substantially the same results so far as the rights and obligations to deliver water are concerned, as would have existed if such substitution of stations and measurements had not been so made. (Note: See Resolution of Commission printed elsewhere in this report.)

ARTICLE VI

Commencing with the year following the effective date of this Compact, all credits and debits of Colorado and New Mexico shall be computed for each calendar year; provided, that in a year of actual spill no

annual credits nor annual debits shall be computed for that year.

In the case of Colorado, no annual debit nor accrued debit shall exceed 100,000 acre feet, except as either or both may be caused by holdover storage of water in reservoirs constructed after 1937 in the drainage basin of the Rio Grande above Lobatos. Within the physical limitations of storage capacity in such reservoirs, Colorado shall retain water in storage at all times to the extent of its accrued debit.

In the case of New Mexico, the accrued debit shall not exceed 200,000 acre feet at any time, except as such debit may be caused by holdover storage of water in reservoirs constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and San Marcial. Within the physical limitations of storage capacity in such reservoirs, New Mexico shall retain water in storage at all times to the extent of its accrued debit. In computing the magnitude of accrued credits or debits, New Mexico shall not be charged with any greater debit in any one year than the sum of 150,000 acre-feet and all gains in the quantity of water in storage in such year.

The Commission by unanimous action may authorize the release from storage of any amount of water which is then being held in storage by reason of accrued debits of Colorado or New Mexico; provided, that such water shall be replaced at the first opportunity thereafter.

In computing the amount of accrued credits and accrued debits of Colorado or New Mexico, any annual credits in excess of 150,000 acre feet shall be taken as equal to that amount.

In any year in which actual spill occurs, the accrued credits of Colorado, or New Mexico, or both, at the beginning of the year shall be reduced in proportion to their respective credits by the amount of such actual spill; provided that the amount of actual spill shall be deemed to be increased by the aggregate gain in the amount of water in storage, prior to the time of spill, in reservoirs above San Marcial constructed after 1929; provided, further, that if the Commissioners for the States having accrued credits authorize the release of part, or all, of such credits in advance of spill, the amount so released shall be deemed to constitute actual spill.

In any year in which there is actual spill of usable water, or at the time of hypothetical spill thereof, all accrued debits of Colorado, or New Mexico, or both, at the beginning of the year shall be cancelled.

In any year in which the aggregate of accrued debits of Colorado and New Mexico exceeds the minimum unfilled capacity of project storage, such debits shall be reduced proportionally to an aggregate amount equal to such minimum unfilled capacity.

To the extent that accrued credits are impounded in reservoirs between San Marcial and Courchesne, and to the extent that accrued debits are impounded

in reservoirs above San Marcial, such credits and debits shall be reduced annually to compensate for evaporation losses in the proportion that such credits or debits bore to the total amount of water in such reservoirs during the year.

ARTICLE VII

Neither Colorado nor New Mexico shall increase the amount of water in storage in reservoirs constructed after 1929 whenever there is less than 400,000 acre feet of usable water in project storage; provided, that if the actual releases of usable water from the beginning of the calendar year following the effective date of this Compact, or from the beginning of the calendar year following actual spill, have aggregated more than an average of 790,000 acre feet per annum, the time at which such minimum stage is reached shall be adjusted to compensate for the difference between the total actual release and releases at such average rate; provided, further, that Colorado, or New Mexico, or both, may relinquish accrued credits at any time, and Texas may accept such relinquished water, and in such event the state, or states, so relinquishing shall be entitled to store water in the amount of the water so relinquished.

ARTICLE VIII

During the month of January of any year the Commissioner for Texas may demand of Colorado and New Mexico, and the Commissioner for New Mexico

may demand of Colorado, the release of water from storage reservoirs constructed after 1929 to the amount of the accrued debits of Colorado and New Mexico, respectively, and such releases shall be made by each at the greatest rate practicable under the conditions then prevailing, and in proportion to the total debit of each, and in amounts, limited by their accrued debits, sufficient to bring the quantity of usable water in project storage to 600,000 acre feet by March first and to maintain this quantity in storage until April thirtieth, to the end that a normal release of 790,000 acre feet may be made from project storage in that year.

ARTICLE IX

Colorado agrees with New Mexico that in event the United States or the State of New Mexico decides to construct the necessary works for diverting the waters of the San Juan River, or any of its tributaries, into the Rio Grande, Colorado hereby consents to the construction of said works and the diversion of waters from the San Juan River, or the tributaries thereof, into the Rio Grande in New Mexico, provided the present and prospective uses of water in Colorado by other diversions from the San Juan River, or its tributaries, are protected.

ARTICLE X

In the event water from another drainage basin shall be imported into the Rio Grande Basin by the

United States or Colorado or New Mexico, or any of them jointly, the State having the right to the use of such water shall be given proper credit therefor in the application of the schedules.

ARTICLE XI

New Mexico and Texas agree that upon the effective date of this Compact all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled; however, nothing herein shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another. Nothing herein shall be construed as an admission by any signatory state that the use of water for irrigation causes increase of salinity for which the user is responsible in law.

ARTICLE XII

To administer the provisions of this Compact there shall be constituted a Commission composed of one representative from each state, to be known as the Rio Grande Compact Commission. The State Engineer of Colorado shall be ex-officio the Rio Grande Compact Commissioner for Colorado. The State Engineer of New Mexico shall be ex-officio the Rio Grande Compact Commissioner for New Mexico. The Rio Grande Compact Commissioner for Texas

shall be appointed by the Governor of Texas. The President of the United States shall be requested to designate a representative of the United States to sit with such Commission, and such representative of the United States, if so designated by the President, shall act as Chairman of the Commission without vote.

The salaries and personal expenses of the Rio Grande Compact Commissioners for the three States shall be paid by their respective States, and all other expenses incident to the administration of this Compact, not borne by the United States, shall be borne equally by the three States.

In addition to the powers and duties hereinbefore specifically conferred upon such Commission, and the members thereof, the jurisdiction of such Commission shall extend only to the collection, correlation and presentation of factual data and the maintenance of records having a bearing upon the administration of this Compact, and, by unanimous action, to the making of recommendations to the respective States upon matters connected with the administration of this Compact. In connection therewith, the Commission may employ such engineering and clerical aid as may be reasonably necessary within the limit of funds provided for that purpose by the respective States. Annual reports compiled for each calendar year shall be made by the Commission and transmitted to the Governors of the signatory States on or before March first following the year covered by the report. The Commission may, by unanimous action, adopt rules

and regulations consistent with the provisions of this Compact to govern their proceedings.

The findings of the Commission shall not be conclusive in any court or tribunal which may be called upon to interpret or enforce this Compact.

ARTICLE XIII

At the expiration of every five-year period after the effective date of this Compact, the Commission may, by unanimous consent, review any provisions hereof which are not substantive in character and which do not affect the basic principles upon which the Compact is founded, and shall meet for the consideration of such questions on the request of any member of the Commission; provided, however, that the provisions hereof shall remain in full force and effect until changed and amended within the intent of the Compact by unanimous action of the Commissioners, and until any changes in this Compact are ratified by the legislatures of the respective states and consented to by the Congress, in the same manner as this Compact is required to be ratified to become effective.

ARTICLE XIV

The schedules herein contained and the quantities of water herein allocated shall never be increased nor diminished by reason of any increase or diminution in the delivery or loss of water to Mexico.

ARTICLE XV

The physical and other conditions characteristic of the Rio Grande and peculiar to the territory drained and served thereby, and to the development thereof, have actuated this Compact and none of the signatory states admits that any provisions herein contained establishes any general principle or precedent applicable to other interstate streams.

ARTICLE XVI

Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties, or to the Indian Tribes, or as impairing the rights of the Indian Tribes.

ARTICLE XVII

This Compact shall become effective when ratified by the legislatures of each of the signatory states and consented to by the Congress of the United States. Notice of ratification shall be given by the Governor of each state to the Governors of the other states and to the President of the United States, and the President of the United States is requested to give notice to the Governors of each of the signatory states of the consent of the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this Compact in quadruplicate original,

one of which shall be deposited in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

Done at the City of Santa Fe, in the State of New Mexico, on the 18th day of March, in the year of our Lord, One Thousand Nine Hundred and Thirty-eight.

(Sgd.) M. C. HINDERLIDER
(Sgd.) THOMAS M. McCLURE
(Sgd.) FRANK B. CLAYTON

APPROVED:
(Sgd.) S. O. HARPER

RATIFIED BY:
Colorado, February 21, 1939
New Mexico, March 1, 1939
Texas, March 1, 1939
Passed Congress as Public Act No. 96, 76th Congress, Approved by the President May 31, 1939

No. _____, Original

In The
Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

TABLE OF CONTENTS

Page

INTRODUCTION 1

BACKGROUND STATEMENT 5

1. The Rio Grande Basin 5

2. The Rio Grande Project 6

3. United States' Treaty with Mexico 8

4. The Rio Grande Compact 9

   A. A Brief History of Negotiations and Adoption of the Compact 9

   B. An Overview of the Compact 10

   C. Rio Grande Compact Apportionment 14

5. Post-Compact Developments in the Rio Grande Basin in Southern New Mexico and the Present Controversy 14

ARGUMENT 18

1. The Seriousness and Dignity of Texas' Claims Warrant Exercise of the Court's Original Jurisdiction 19

Page

2. The State of Texas Has No Alternative Forum 21

CONCLUSION 28

Appendix A: Map of Rio Grande Basin A-1

Appendix B: Map of Rio Grande Project A-2

TABLE OF AUTHORITIES

Page(s)

CASES

Hinderlider v. La Plata River & Cherry Creek Ditch Co.,
304 U.S. 92 (1938) 20

Kansas v. Colorado,
185 U.S. 125 (1902) 19

Kansas v. Colorado,
514 U.S. 673 (1995) 18

Mississippi v. Louisiana,
506 U.S. 73 (1992) 18, 19, 22

Oklahoma and Texas v. New Mexico,
501 U.S. 221 (1991) 18

State v. Hidalgo County Water & Improvement District No. 18, 443 S.W.2d 728 (Tex. Civ. App. - Corpus Christi, 1969) 6

Texas v. New Mexico, et al.
296 U.S. 547 (1935) 10

Texas v. New Mexico, et al.,
308 U.S. 510 (1939) 10

Page(s)

Texas v. New Mexico
462 U.S. 554 (1983) ..... 18 *passim*

Texas v. New Mexico,
482 U.S. 124 (1987) 22, 23

Virginia v. West Virginia,
206 U.S. 290 (1907) 18

West Virginia ex rel. Dyer v. Sims,
314 U.S. 22 (1951) 19

Wyoming v. Oklahoma
502 U.S. 437 (1992) 22

CONSTITUTIONS

United States Constitution

Article III, Section 2, Clause 2 ..... 18, 22

Article IV, Section 1 16

STATUTES

28 U.S.C. § 1251(a) 18, 22

Act of Feb. 25, 1905, Ch. 798,
33 Stat. 814 ..... 2 *passim*

Page(s)

Act of June 17, 1930, ch. 506, 46 Stat. 767 ..... 9, 10

Convention with Mexico for Upper Rio Grande, 34 Stat. 2953 ..... 8, 9

Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ..... 1 *passim*

TREATISES AND OTHER AUTHORITIES

Certificate of Adjudication, No. 23-5940 (March 7, 2007) 15, 16

Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution — A Study in Interstate Adjustments*, 34 Yale L.J. 685 (1925) 27

In Re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Texas) Segment of the Rio Grande Basin, *Final Decree* (327th Judicial Dist., Court of El Paso County, Texas, Cause No. 2006-3291, Oct. 30, 2006) 15, 16

Notice of Water Appropriation, Rio Grande Project (Jan. 23, 1906) 8, 15

Page(s)

Resolution Adopted by Rio Grande Compact Commission at the Annual Meeting Held at El Paso, Texas, Feb. 22-24, 1948 11

Supplemental Notice of Water Appropriation (April 1908) 8, 15

No. _____, Original

In The
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STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

The State of Texas, in support of its Motion for Leave to File Complaint, submits the following:

INTRODUCTION

Texas seeks to invoke the Court's original jurisdiction to obtain a determination and enforcement of its rights as against the State of New Mexico to the waters of the Rio Grande pursuant to the Rio Grande Compact, 53 Stat. 785 (1939) (hereafter "Rio Grande Compact" or "Compact"). The Rio Grande Compact is reprinted in the Appendix to

the Complaint ("App. to Compl."). Texas brings its claims to this Court after first attempting to resolve with New Mexico the fundamental differences Texas has with New Mexico's interpretations of and actions with respect to the Rio Grande Compact.

The Rio Grande Compact is unique because it does not set forth a specific New Mexico delivery requirement at the New Mexico–Texas state line. Instead, it requires New Mexico to deliver water into Elephant Butte Reservoir, the major storage facility for the Rio Grande Reclamation Project ("Rio Grande Project"). The Rio Grande Project was authorized pursuant to the Rio Grande Project Act, Act of February 25, 1905, ch. 798, 33 Stat. 814 ("Rio Grande Project Act"). The Rio Grande Project, including the reservation of all necessary water rights, pre-dates the Rio Grande Compact, and is the basis and provides the means for the equitable apportionment of the waters of the Rio Grande between Texas and New Mexico.

As detailed below, the Rio Grande Compact, among other purposes, was entered into to protect the operation and integrity of the Rio Grande Project. The Rio Grande Compact requires that New Mexico deliver specified amounts of Rio Grande water into Elephant Butte Reservoir. Once delivered to Elephant Butte Reservoir, that water is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual

arrangements. In order for water to be delivered to Rio Grande Project beneficiaries in southern New Mexico and in Texas, it must be released from Rio Grande Project facilities, and allowed to flow unimpeded through Rio Grande Project lands in southern New Mexico, and then across the state line into Texas. New Mexico has, contrary to the purpose and intent of the Rio Grande Compact, allowed and authorized Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico. New Mexico's actions, in allowing and authorizing the interception of Rio Grande Project water intended for use in Texas, violates the purpose and intent of the Rio Grande Compact, causing grave and irreparable injury to Texas.

New Mexico has repeatedly violated its obligations under the Rio Grande Compact in derogation of Texas' rights in the Rio Grande Project and under the Rio Grande Compact. New Mexico's breach of its Rio Grande Compact obligations falls within two primary categories. First, New Mexico has allowed post-Compact diversions of surface water and of underground water below Elephant Butte Dam, for use in New Mexico, thereby depleting the water available from the Rio Grande Project, and to which Rio Grande Project beneficiaries in southern New Mexico and in Texas are entitled pursuant to the Rio Grande Project Act and the Rio Grande Compact. Second, in state and federal court proceedings, and through its Rio Grande Compact Commissioner, New Mexico has posited misguided interpretations of the Rio Grande Project Act and the

Rio Grande Compact in an effort to wrest control of the operations of the Rio Grande Project from the United States, and to deprive Texas of its rights in the Rio Grande Project and under the Rio Grande Compact.

Neither the New Mexico state court litigation, nor the litigation that New Mexico initiated in federal district court in New Mexico, provide appropriate forums to resolve Texas' dispute with New Mexico. Texas is not a party to either of these actions, and is not otherwise subject to the jurisdiction of these courts. Decisions of the Rio Grande Compact Commission must be unanimous, and there is a current impasse on critical issues regarding the rights and obligations of New Mexico and Texas under the Rio Grande Project Act and the Rio Grande Compact. Given this impasse, no resolution of Texas' dispute with New Mexico will be forthcoming in the context of the Rio Grande Compact Commission. Only this Court, through the exercise of its original jurisdiction, can resolve the disputes as between Texas and New Mexico over the interstate waters of the Rio Grande.

New Mexico's violations of the Rio Grande Compact have caused, and if not remedied will continue to cause, direct, immediate, grave, and irreparable injury to Texas and its citizens, by preventing Texas from receiving the amount of Rio Grande Project water to which it is entitled and which is protected by the Rio Grande Compact. The Rio Grande is the primary, at some places the only,

source of supply for agricultural lands within Texas that are the intended beneficiaries of Texas' allocation of Rio Grande water. In addition, the Rio Grande Project water supply constitutes, on average, 50% of the annual water supply for the City of El Paso, Texas.

So long as New Mexico refuses to acknowledge its Rio Grande Compact obligations to Texas, no amount of negotiation or mediation can address Texas' claims. And so long as the matter continues unresolved by this Court, New Mexico can simply continue to divert, pump and use water in excess of its Rio Grande Compact apportionment, to the continued detriment of Texas.

BACKGROUND STATEMENT

1. The Rio Grande Basin

The Rio Grande is an interstate and international river which originates in the State of Colorado, flows in a southerly direction into and through New Mexico and then into Texas. The Rio Grande, after crossing the New Mexico–Texas state line, forms the international boundary between the United States and the United States of Mexico ("Mexico").[2] A map of the Rio Grande Basin is

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[2] The Rio Grande has also been described as follows: "The Rio Grande is one of the historic rivers of North America. It is also one of the longest. It rises in the high Rockies of southern

Footnote continued on following page.

included in the Appendix to this Brief at A-1; Texas Commission on Environmental Quality.

2. The Rio Grande Project

In 1904, the Twelfth National Irrigation Congress was held in El Paso, Texas, for the purpose of addressing and resolving a dispute between interests in New Mexico and interests in Texas over the waters of the Rio Grande. Twelfth National Irrigation Congress Held at El Paso, Texas (Nov. 15-18, 1904); hereafter "1904 Irrigation Congress." The result of the 1904 Irrigation Congress was a recommendation for the construction by the United States of a federal dam and reservoir near Engle, New Mexico (which became Elephant Butte Dam and Reservoir), to be operated as a federal reclamation project pursuant to the Reclamation Act of 1902 by the United States Bureau of Reclamation ("Bureau of Reclamation"). The 1904 Irrigation

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Colorado and flows from Colorado through New Mexico, reaches Texas near El Paso and thence flows in a general southeasterly direction to the Gulf of Mexico near Brownsville. By act of the Congress of the Republic of Texas of December 19, 1836, the river was established as the boundary between Texas and Mexico." *State v. Hidalgo County Water & Improvement District No. 18*, 443 S.W.2d 728, 733-34 (Tex. Civ. App – Corpus Christi, 1969) *writ refused, no reversible error.*

Congress also recommended allocation of water between water users in Texas and those in southern New Mexico based on the ratio of Project lands within each state. The 1904 Irrigation Congress recommendations were adopted by the Secretary of the Interior, and were authorized pursuant to the Rio Grande Project Act. Historically, this ratio of Rio Grande Project lands has been 57% in New Mexico and 43% in Texas. The Bureau of Reclamation commenced operation of the Rio Grande Project in 1916. A map of the Rio Grande Project is included in the Appendix to this Brief at A-2; U.S. Dept. of the Interior, Bureau of Reclamation, Upper Colorado Region, *Legal and Institutional Framework for Rio Grande Project Water Supply and Use . . . a legal hydrograph, Final Draft* (Oct. 1995) at Figure 1.

In 1906, the United States contracted for the water developed by the Rio Grande Project with (1) the Elephant Butte Water Users Association, a predecessor entity to the current Elephant Butte Irrigation District ("EBID"), a political subdivision of the State of New Mexico, for the water allocated and apportioned for use within New Mexico; and (2) with the El Paso Valley Water Users Association, a predecessor entity to the current El Paso County Water Improvement District No. 1 ("EPCWID"), a political subdivision of the State of Texas, for the water allocated and apportioned for use within Texas. Agreement (June 27, 1906).

In order to effectuate the federal purposes of the Rio Grande Project, in 1906 and again in 1908,

the United States filed notices with the Territorial Engineer of the Territory of New Mexico for reservations by the United States of Rio Grande water for the Rio Grande Project, which gave notice that the United States had acquired and set aside all unappropriated waters of the Rio Grande for the purposes of the Rio Grande Project. Notice of Water Appropriation, Rio Grande Project (Jan. 23, 1906), and Supplemental Notice of Water Appropriation (April 1908), found at *Bean v. United States*, 163 F.Supp. 838, 840 n.1 (Ct.Cl. 1958). Accordingly, the Rio Grande Project water rights include all of the waters of the lower Rio Grande unappropriated at the time of the planning and authorization of the Rio Grande Project, inclusive of all water derived from Rio Grande Project releases. Return flows, drain flows, seepage and tributary groundwater are essential to the ability of the United States to operate the Rio Grande Project, and fully meet the rights of Texas to the waters of the Rio Grande.

3. United States' Treaty with Mexico

In 1906, the United States and Mexico entered into the Convention between the United States and Mexico for the Equitable Distribution of the Waters of the Rio Grande. Convention with Mexico for Upper Rio Grande, 34 Stat. 2953; hereafter the "1906 Treaty". The 1906 Treaty provided for delivery of up to 60,000 acre-feet of water annually to Mexico from the Rio Grande Project at or near El Paso, Texas, and Juarez, Mexico. 1906 Treaty, at Article I. The water provided for under the 1906 Treaty is to be

distributed through the year in the same proportions as the water supplies delivered to Texas in the vicinity of El Paso, Texas, pursuant to a schedule provided for in the Treaty. 1906 Treaty, at Article II.

4. The Rio Grande Compact

A. A Brief History of Negotiations and Adoption of the Compact

Prior to and between 1905 and 1929, water development occurred or was threatened to occur within the States of Colorado and New Mexico on the Rio Grande or its tributaries upstream of Elephant Butte Reservoir. As a consequence, a moratorium on the development of water upstream of Elephant Butte Reservoir in both New Mexico and Colorado was effectively imposed. (This moratorium was enforced by the Secretary of the Interior through the refusal to grant rights-of-way across public lands in Colorado and New Mexico that were needed in order to perfect the diversion of Rio Grande water.) In 1929, Colorado, New Mexico and Texas entered into a Temporary Interstate Compact that was later consented to by the United States, to address the interstate allocation of the waters of the Rio Grande. Act of June 17, 1930, ch. 506, 46 Stat. 767; hereafter "1929 Compact." This 1929 Compact was by its terms only an interim resolution of the interstate disputes. 1929 Compact, Articles VII, XIV and XVI.

Prior to the termination of the 1929 Compact, the Secretary of the Interior signaled his intent to

lift the moratorium on the further development of waters of the Rio Grande, and various parties within Colorado and New Mexico indicated that they would refuse to enter into a long term Compact after the term of the 1929 Compact expired. In response, the State of Texas filed an original action in this Court which was accepted and in which a Special Master was assigned. *Texas v. New Mexico, et al.*, 296 U.S. 547 (1935). Trial of this original action had begun, with testimony and evidence introduced when, in 1938, the final Rio Grande Compact was approved. As a consequence of the 1938 Compact, that original action before this Court was dismissed. *Texas v. New Mexico, et al.*, 308 U.S. 510 (1939).

B. An Overview of the Compact

The States of Colorado, New Mexico, and Texas signed the Rio Grande Compact on March 18, 1938. The Rio Grande Compact was ratified thereafter by the respective state Legislatures, and was consented to and approved by the United States pursuant to an Act of Congress. Act of May 31, 1939, ch. 155, 53 Stat. 785, App. to Compl. at App. 20.

As noted, the Rio Grande Compact is unique in several material ways. The most significant is that it incorporates the basic assumption of the authorization, construction and operation of the Rio Grande Project by the United States. Without this basic assumption the Rio Grande Compact would have little meaning and would be incapable of fulfilling the Rio Grande Compact rights of Texas.

In fact, the Rio Grande Compact is a means of protecting the Rio Grande Project, its operations and the allocations of water to Rio Grande Project beneficiaries.

Various provisions of the Rio Grande Compact reflect one of the Rio Grande Compact's fundamental purposes of protecting the Rio Grande Project. For example, Article III of the Rio Grande Compact requires that Colorado deliver water in the Rio Grande at the Colorado–New Mexico state line in established quantities, based upon flows of water that are measured at various index stations. App to Compl. at App. 5-8.

Additional manifestations of the intent to protect the Rio Grande Project are found in Articles I, IV and VII of the Rio Grande Compact. App. to Comp. at App. 1-4, 9-11, and 14. Article IV obligates New Mexico to deliver water in the Rio Grande at San Marcial, New Mexico, which is just upstream of Elephant Butte Reservoir. App. to Compl. at App. 9-11. In 1948, a Resolution adopted by the Rio Grande Compact Commission, in accordance with its powers afforded under Article XII of the Compact, changed the location of the gage for the measurement of New Mexico's deliveries to Elephant Butte Reservoir. Resolution Adopted by Rio Grande Compact Commission at the Annual Meeting Held at El Paso, Texas, Feb. 22-24, 1948, Changing Gaging Stations and Measurements of Deliveries by New Mexico (Feb. 24, 1948). These deliveries to Elephant Butte Reservoir, and thus to the Rio Grande Project, are

based upon a tabulation of relationships that correspond to the quantity of water at specified indices in New Mexico. These index flows are to be further adjusted to establish New Mexico's delivery obligation based upon the water that would have been available for Rio Grande Project operations absent upstream development that took place after 1929 and 1937. Water is delivered to Elephant Butte Reservoir because it was (and still is) the primary water storage location for the Rio Grande Project when the Rio Grande Compact was adopted.

Article I(l) of the Rio Grande Compact defines "usable water" as "all water, exclusive of credit water, which is in [Rio Grande] project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico." App. to Compl. at App. 3. Article I also defines "credits" and "debits" as the amounts of water delivered or not delivered by Colorado or New Mexico above or below their respective delivery obligations. *Id.* at App. 2. Article VI of the Rio Grande Compact allows for and delineates how "credits" and "debits" are to be accounted. *Id.* at App 11-14. All of these terms reflect the interconnected nature of the Rio Grande Project and the Rio Grande Compact, because these terms have no meaning absent the existence and operation of the Rio Grande Project by the United States.

Article VII of the Rio Grande Compact precludes Colorado and New Mexico from increasing the amount of water in storage in reservoirs

constructed after 1929 whenever there is less than 400,000 acre-feet of usable water stored in Rio Grande Project facilities, subject to exceptions associated with releases from Elephant Butte Reservoir that are, on average, greater than 790,000 acre-feet per annum, or where there are relinquishments of accrued credits available. App. to Compl. at App. 14. Credits are prescribed in Article VI of the Rio Grande Compact. *Id.* at App. 11-14. Under specified circumstances, Article VIII of the Rio Grande Compact allows the Commissioner of Texas to demand that Colorado and/or New Mexico release water from storage in reservoirs constructed after 1929 to the amount of accrued debits sufficient to bring the quantity of usable water in Rio Grande Project storage to 600,000 acre-feet. *Id.* at App. 14-15.

Article XI of the Rio Grande Compact provides that nothing within the Compact shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of water, at the point of delivery, be changed hereafter by one signatory state to the injury of another. App. to Compl. at App. 16.

Article XII of the Rio Grande Compact created the Rio Grande Compact Commission, and requires that the actions of the Rio Grande Compact Commission be unanimous. App. to Compl. at App. 17-18. Article XIII of the Compact requires that the terms of the Rio Grande Compact cannot be

amended without the unanimous approval of all four parties to the Compact. *Id.* at App. 18.

C. Rio Grande Compact Apportionment

The allocations of water, provided for as part of the authorization of the Rio Grande Project, were intended by the Rio Grande Compact to also apportion the waters of the Rio Grande between New Mexico and Texas. The stated purpose of the Rio Grande Compact was "for the purpose of effecting an equitable apportionment of such waters [of the Rio Grande above Fort Quitman, Texas]." App. to Compl., Preamble at App. 1. The Rio Grande Compact provides for specific Colorado and New Mexico delivery requirements, including the New Mexico requirement to deliver specified quantities of water into Rio Grande "Project Storage." *Id.*, Article IV at App. 9-11. The majority of defined terms within the Rio Grande Compact address the apportionment and use of water among Colorado, New Mexico and Texas, all within the context of the Rio Grande Project. *See, e.g., Id.*, Articles I(g)-(q) at App. 2-4.

5. Post-Compact Developments in the Rio Grande Basin in Southern New Mexico and the Present Controversy

The Rio Grande Compact is intended to protect, from development upstream in New Mexico and Colorado, the use of water within southern New

Mexico and Texas that existed prior to the authorization of the Rio Grande Project. The United States, in 1906 and again in 1908, as part of the planning and implementation of the Rio Grande Project, set aside all of the unappropriated waters of the Rio Grande that were necessary for the operation of the Rio Grande Project. Notice of Water Appropriation and Supplemental Notice of Water Appropriation, *supra*. The Rio Grande Compact succeeded to these water rights.

Consistent with the provisions of the Rio Grande Project Act and the Rio Grande Compact, the State of Texas has adjudicated the Rio Grande above Fort Quitman, Texas, entering a final decree binding on the United States and EPCWID. In Re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Texas) Segment of the Rio Grande Basin, *Final Decree* (327th Judicial Dist. Court of El Paso County, Texas, Cause No. 2006-3291, Oct. 30, 2006). In furtherance, Texas has issued a Certificate of Adjudication allowing for the diversion of water sufficient to meet Rio Grande Project and Rio Grande Compact diversion and use rights in Texas. Certificate of Adjudication No. 23-5940 (March 7, 2007). The Certificate of Adjudication assumes compliance by the State of New Mexico with the provisions of the Rio Grande Project Act and the Rio Grande Compact. Absent New Mexico's compliance with the provisions of the Rio Grande Project Act and the Rio Grande Compact, the judicial decree entered into in Texas can have no practical effect, and cannot serve as a

source of legal stability to those in Texas who obtain water from the Rio Grande Project. The Certificate of Adjudication and the Final Decree of the 327th Judicial District Court in El Paso County, Texas, have not been given full faith and credit by the State of New Mexico, in violation of Article IV, Section 1 of the United States Constitution.

As also noted above, the State of New Mexico has allowed and authorized the diversion, extraction and use, in New Mexico, of Rio Grande Project water that has been allocated to Texas. These diversions, extractions and use include Rio Grande Project return flows and other underground water that is hydrologically connected to the Rio Grande, and to which the United States has superior rights, including the right to deliver that water to Texas. Additionally, New Mexico has permitted the extractions of tributary groundwater that create underground voids that must be filled by releases from the Rio Grande Project before Rio Grande Project water can be delivered to Texas. These actions allowed and authorized by New Mexico have increased to a level that cannot be sustained, and which are causing and will continue to cause harm to Texas, if New Mexico is not enjoined by this Court.

New Mexico has refused to address Texas' concerns and has refused to remediate the harm caused by its unlawful acts in violation of the Rio Grande Compact. Instead, New Mexico has attempted to make permanent its unlawful actions through assertions made in a New Mexico state court

water adjudication. *State of New Mexico v. Elephant Butte Irrigation District* (3d Judicial Dist. Court of Doña Ana County, New Mexico, No. CV-96-888). There, New Mexico is asserting and advancing novel theories of law that are contrary to rights held by the United States for the Rio Grande Project as well as the Rio Grande Compact, and which would deprive Texas of water it is entitled to under the Rio Grande Project Act and the Rio Grande Compact. In that case, New Mexico denies that it has any responsibility to ensure that water released for the benefit of Texas is not intercepted and used in New Mexico. Texas is not a party to that New Mexico state court litigation.

The United States, working with EBID and EPCWID, attempted to address at least a portion of the problem created by New Mexico's unlawful use of Rio Grande Project water, through the Operating Agreement for the Rio Grande Project (March 10, 2008), hereafter the "2008 Operating Agreement." This agreement sought to identify otherwise unsanctioned use of Rio Grande Project water by EBID landowners and to account for that use in a manner that would debit the water used from EBID's Rio Grande Project allocations. The agreement also sought to allow both EBID and EPCWID to "bank" water in Elephant Butte Reservoir that was not used in one year for use in later years, thereby allowing for the more efficient management of the Rio Grande Project, and ensuring that the respective Rio Grande Compact apportionments can be maintained. In response,

New Mexico challenged the 2008 Operating Agreement in federal district court in New Mexico. *State of New Mexico v. U.S. Bureau of Reclamation, et al.*, No. Civ. 11-691 JB/WDS (D. N.M. filed Aug. 8, 2011). There, New Mexico is advancing novel interpretations of the Rio Grande Compact in an effort to wrest operational control of the Rio Grande Project from the United States. Texas is not a party to that New Mexico federal district court litigation.

ARGUMENT

This Court has original and exclusive jurisdiction over cases and controversies between two or more states. *See* U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a). The jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. 554, 567 (1983) (citing *Virginia v. West Virginia*, 206 U.S. 290, 317-19 (1907)); *see Kansas v. Colorado*, 514 U.S. 673 (1995); *Oklahoma and Texas v. New Mexico*, 501 U.S. 221 (1991). It is necessary for the Court to exercise its original jurisdiction here to declare and enforce the rights of the State of Texas under the Rio Grande Compact.

The Court examines two factors in deciding whether to grant leave to file a complaint in an original action. First, the Court considers the "nature of the interest of the complaining State," with a focus on the "seriousness and dignity of the claim." *Mississippi v. Louisiana*, 506 U.S. 73, 77

(1992) (citation omitted). Second, the Court assesses "the availability of an alternative forum in which the issue tendered can be resolved." *Id.* Applying these factors, the Court should exercise its original jurisdiction in this case, and Texas should be granted leave to file its Complaint.

1. The Seriousness and Dignity of Texas' Claims Warrant Exercise of the Court's Original Jurisdiction

A dispute over the waters of interstate rivers apportioned by a compact is the archetypal dispute that can only be resolved by this Court. "The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas v. New Mexico*, 462 U.S. at 571 n.18; *see Kansas v. Colorado*, 185 U.S. 125, 143-44 (1902). New Mexico's prior and ongoing violations of the Rio Grande Compact, if not remedied, will continue to cause direct, immediate, grave and irreparable injury to Texas. If Texas and New Mexico were fully sovereign, New Mexico's intentional violations of the Rio Grande Compact would amount to *casus belli*. An injury of this kind implicates this Court's jurisdiction.

An interstate compact requires congressional consent, and is essentially a federally recognized treaty between two or more sovereign States. *See, e.g., West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951) (stating that an interstate compact "adapts

to our Union of sovereign States the age-old treaty-making power of independent sovereign nations"). Texas brings this action as a sovereign party to the Rio Grande Compact. In this capacity, it asserts a sovereign interest in enforcing its rights under the Rio Grande Compact. Texas' demand for recognition of these rights by another sovereign is an "easily identified" sovereign interest that is properly asserted in this interstate action. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (States' authority to apportion interstate rivers by Compact is "a part of the general right of sovereignty.").

Texas claims that New Mexico is depriving it of its lawful share to the Rio Grande, an interstate stream. In this claim, Texas asserts a substantial sovereign interest that occupies the traditional scope of this Court's original jurisdiction. Texas claims that New Mexico has disregarded its obligations under the Rio Grande Compact, including, but not limited to, allowing and authorizing its citizens to capture and consume Rio Grande Project water intended by the Rio Grande Compact and the Rio Grande Project Act for delivery and use in Texas. New Mexico asserts in response that the enormous amounts of pumping of underground water occurring in southern New Mexico are not affected by the Rio Grande Compact, and that it has no obligation at all to ensure Texas' allocation at the New Mexico–Texas state line. In addition, New Mexico asserts that it can impede and interfere with the United States' operation of the Rio Grande Project to the detriment

of Texas. The dispute centers on a fundamental difference in the interpretation of the plain terms of the Rio Grande Compact, and the parties' intent in executing the Compact.

This Court has acknowledged that it has a unique duty to entertain claims concerning the application and understanding of interstate compacts. *Texas v. New Mexico*, 462 U.S. at 567-68. Here, Texas and New Mexico fundamentally disagree as to the Compact's meaning. So long as New Mexico refuses to acknowledge its Rio Grande Compact obligations to Texas, no amount of negotiation or mediation can address Texas' claims. Furthermore, so long as the matter continues to be unresolved by this Court, New Mexico can simply continue to divert, pump and use water in excess of its Rio Grande Compact apportionment, and capture Rio Grande Project water allocated to Texas, to the direct, immediate, and irreparable injury to Texas' Compact rights. The dispute over the Rio Grande Compact's interpretation has a considerable impact on Texas because the meaning of the Compact directly influences the amount of water that Texas receives. Without the water allocated to Texas by the Rio Grande Compact, Texas water users will continue to suffer adverse consequences.

2. The State of Texas Has No Alternative Forum

Texas has no alternative forum in which the issue may be resolved; consequently, the Court

should exercise its original jurisdiction. *Mississippi v. Louisiana*, 506 U.S. at 77. In evaluating the availability of an alternative forum, this Court considers whether the alternative may provide "full relief" for the States. *Wyoming v. Oklahoma*, 502 U.S. 437, 452 (1992). In this case, no alternative forum will provide "full relief" for Texas.

This Court has stated, "[t]here is no doubt that this Court's jurisdiction to resolve controversies between two States . . . extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. at 567. This Court further explained, "[a] Compact is, after all, a contract," and "[a] court should provide a remedy if the parties intended to make a contract and the contract's terms provide a sufficiently certain basis for determining both that a breach has in fact occurred and the nature of the remedy called for." *Texas v. New Mexico*, 482 U.S. 124, 128-29 (1987) (citations omitted). This Court is the only court in which the State of Texas is permitted to seek such a remedy. *See* U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a).

The Rio Grande Compact Commission is not an adequate alternative forum for resolution of the dispute that gives rise to this lawsuit. While Article XII of the Rio Grande Compact provides the Commission with powers to "administer" the provisions of the Compact, it does not endow in the Commission the power to provide a remedy for breach of the Compact. App. to Compl. at App. 16-

18. Moreover, the Rio Grande Compact does not create an adequate mechanism for resolving the issues concerning Compact application and violations raised in the Complaint. Instead, Article XI recognizes that the States retain their rights to seek adjudication of allegations of breach of the Rio Grande Compact. Article XI provides:

> New Mexico and Texas agree that upon the effective date of this Compact all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled; however, nothing herein shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another.

App. to Compl., Article XI at App. 16.

Thus, this Court is the only forum with the ability to resolve the dispute between Texas and New Mexico. This Court has held that "[b]y ratifying the Constitution, the States gave this Court complete judicial power to adjudicate disputes among them, . . . and this power includes the capacity to provide one State a remedy for the breach of another." *Texas v. New Mexico*, 482 U.S. at 128.

In *Texas v. New Mexico*, the Pecos River Compact, like the Rio Grande Compact, provided a procedure whereby the Pecos River Commission could make some determinations arising incident to its administration of that compact. New Mexico argued that the Court lacked jurisdiction because the Pecos River Compact made the Pecos River Commission the sole arbiter of disputes arising under that compact. This Court disagreed, and stated:

> In the absence of an explicit provision or other clear indications that a bargain to that effect was made, we shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the States' rights.

Texas v. New Mexico, 462 U.S. at 569-70.

This same reasoning applies in the present case. The Rio Grande Compact has no "explicit provision or other clear indications" forbidding relief in this Court. Quite the contrary, the States' retention of their ability to invoke the original jurisdiction of this Court was a vital consideration when they entered the Rio Grande Compact, just like when they entered the Pecos River Compact. *Texas v. New Mexico*, 462 U.S. at 569. Article XI of the Rio Grande Compact evidences the intent of the parties to the Compact to seek relief in this Court. App. to Compl. at App. 16. As such, the plain language of

the Rio Grande Compact provides Texas' right to bring this suit.

Additionally, the Rio Grande Compact Commission is not capable of resolving the present dispute. Article XII of the Compact requires that the actions of the Commission be unanimous. App. to Compl. at App. 17-18. Article XIII of the Compact requires that the terms of the Compact cannot be amended without the unanimous approval of all three states party to the Compact. *Id.* at App. 18. New Mexico's actions, and its disregard for the Rio Grande Compact's apportionment requirements, have resulted in the Commission's inability to reach unanimous consent on important issues. Texas' current cause of action is beyond the scope of the Commission's administration of the Rio Grande Compact because it seeks a declaration, enforcement and protection of Texas' rights, for which a less than unanimous Commission can provide no remedy.

Moreover, even if the Rio Grande Compact provided a mechanism for addressing these issues, resolution of the dispute through the Commission is not possible because the States are in a stalemate over threshold legal questions regarding the proper interpretation of the Compact. As explained above, New Mexico continues to disregard the plain terms and intent of the Rio Grande Compact and the Commission can achieve no consensus. As a result, grave and irreparable injury continues to be suffered by Texas and its citizens and Texas has no recourse but to seek relief in this Court.

This Court has explained that the solution for a stalemate between States that are parties to a Compact "is judicial resolution of such disputes as are amenable to judicial resolution . . . ." *Texas v. New Mexico*, 462 U.S. at 565. Here, the dispute arises from differences in Rio Grande Compact interpretation, and from New Mexico's refusal to recognize and respect Texas' Rio Grande Compact rights to its allocation of Rio Grande Project water. This Court has recognized the necessity of a court remedy for a downstream State, in Texas' position, suffering violations under a compact where an administrative body requires unanimous concurrence of the States in order to act. *Id.* at 568-69 ("New Mexico is the upstream State, with effective power to deny water altogether to Texas except under extreme flood conditions . . . ."). Only this Court can provide that remedy.

Finally, the ongoing New Mexico state court adjudication and the New Mexico federal district court action are not appropriate forums for resolution of this dispute. In the New Mexico state court water adjudication, New Mexico has asserted and advanced novel theories of law that are contrary to the Rio Grande Compact. The State of Texas is not a party to the New Mexico adjudication and is not otherwise subject to the jurisdiction of the New Mexico state court. Additionally, in the New Mexico federal district court action against the United States, New Mexico has raised significant issues associated with the Rio Grande Compact and its

interpretation. Neither the State of Colorado nor the State of Texas is a party to this litigation, and the State of Texas is not otherwise subject to the jurisdiction of that court. Accordingly, the New Mexico state court adjudication and the New Mexico federal district court action do not offer Texas an alternative forum for relief. "[N]o one State can control the power to feed or to starve, possessed by a river flowing through several States." *Texas v. New Mexico*, 462 U.S. at 569 n.15 (quoting Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 Yale L.J. 685, 701 (1925)). Since no single state can unilaterally resolve Rio Grande Compact water allocations, this dispute is only capable of resolution in this Court.

Because Texas' claim that New Mexico has breached the Rio Grande Compact is serious and dignified, and there is no alternative forum in which adequate relief may be obtained for New Mexico's ongoing and escalating violations of the Compact, this Court should invoke its original jurisdiction in this case.

CONCLUSION

The Motion for Leave to File Complaint should be granted.

Respectfully submitted,

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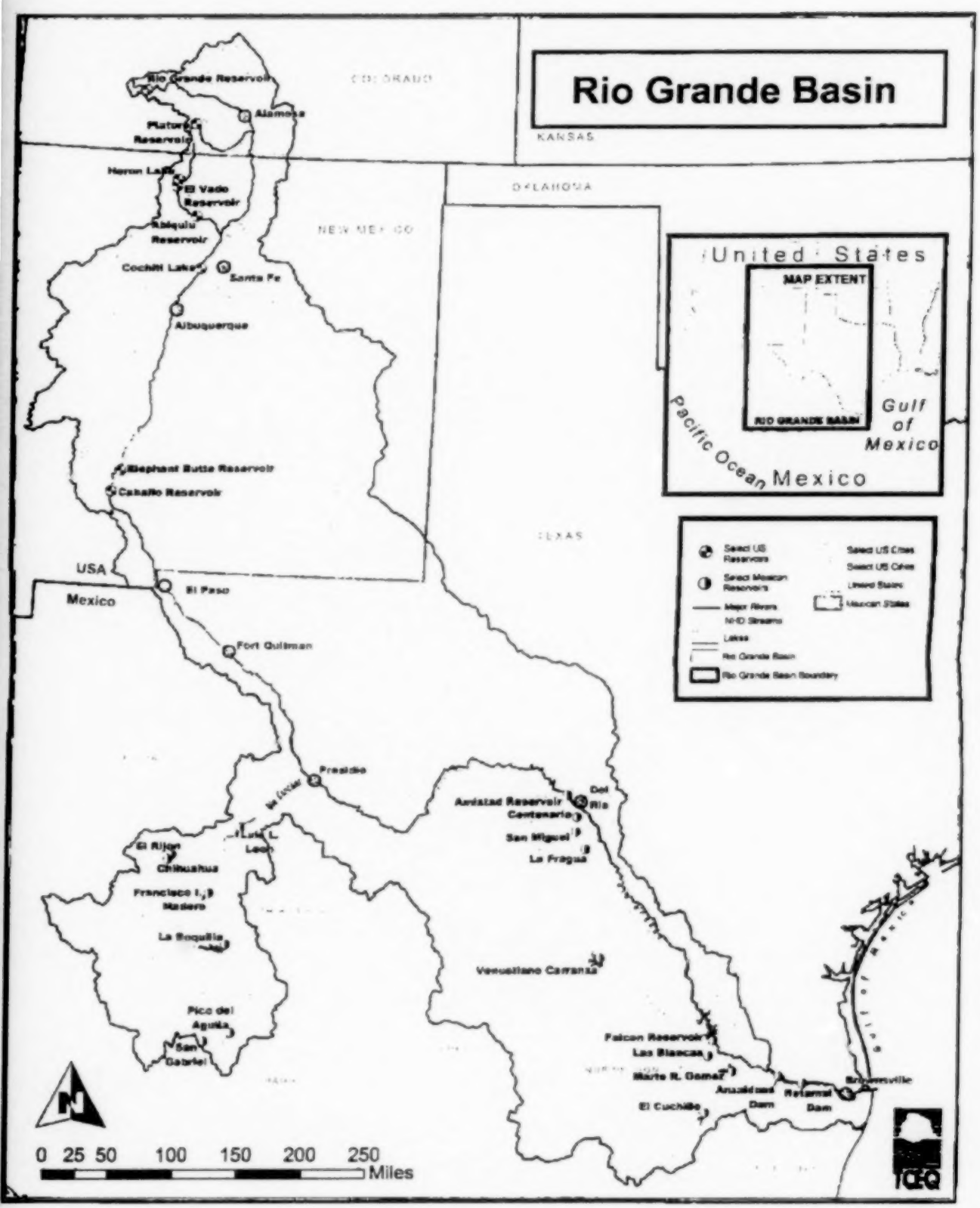
Rio Grande Basin
COLORADO
KANSAS
OKLAHOMA
NEW MEXICO
TEXAS
Rio Grande Reservoir
Alamosa
Platoro Reservoir
Heron Lake
El Vado Reservoir
Abiquiu Reservoir
Cochiti Lake
Santa Fe
Albuquerque
Elephant Butte Reservoir
Caballo Reservoir
USA
Mexico
El Paso
Fort Quitman
Presidio
Amistad Reservoir
Del Rio
Centenario
San Miguel
La Fragua
Luis L. Leon
El Rijon
Chihuahua
Francisco I. Madero
La Boquilla
Venustiano Carranza
Pico del Aguila
San Gabriel
Falcon Reservoir
Las Blancas
Marte R. Gomez
Anzalduas Dam
Retamal Dam
El Cuchillo
Brownsville
United States
MAP EXTENT
RIO GRANDE BASIN
Gulf of Mexico
Pacific Ocean
Mexico
Select US Reservoirs
Select Mexican Reservoirs
Major Rivers
NHD Streams
Lakes
Rio Grande Basin
Rio Grande Basin Boundary
Select US Cities
Select US Cities
United States
Mexican States
0 25 50 100 150 200 250
Miles
TCEQ

SAN MARCIAL GAGING STATION
ELEPHANT BUTTE RESERVOIR
TRUTH OR CONSEQUENCES
ELEPHANT BUTTE DAM AND POWERPLANT
CABALLO RESERVOIR
CABALLO DAM
ARREY CANAL
RIO GRANDE
NELSON CANYON
LUCERO DIKE
LEASBURG DIVERSION DAM
LEASBURG CANAL
Las Cruces
MESILLA DIVERSION DAM
EASTSIDE CANAL
WESTSIDE CANAL
Chamberino
NEW MEXICO
TEXAS
La Union
NEW MEXICO
UNITED STATES
MEXICO
AMERICAN DIVERSION DAM
El Paso
AMERICAN CANAL
MEXICAN DIVERSION DAM
Socorro
Juarez
FRANKLIN CANAL
RIVERSIDE DIVERSION DAM
San Elizario
Fabens
RIVERSIDE CANAL
Tornillo
TORNILLO CANAL
HUDSPETH REGULATING RESERVOIR NO. 1
HUDSPETH CANAL
ALAMO HEADING
HUDSPETH REGULATING RESERVOIR NO. 2
Fort Hancock
FORT QUITMAN GAGING STATION
LEGEND
AREA SERVED BY PROJECT FACILITIES
AREA UNDER RECLAMATION ACT CONTRACT
AGRICULTURAL LANDS IN MEXICO
LOCATION MAP
UNITED STATES
MEXICO
RIO GRANDE PROJECT

Figure 1